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No. 246

In the Supreme Court of the United States

OCTOBER TERM, 1968

NATHAN FRED MARKS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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After a jury trial in the United States District Court for the District of Oregon, petitioner was found guilty on one count of a three-count indictment charging that he had willfully attempted to evade his income taxes in violation of 26 U.S.C. 7201. Petitioner was sentenced to five years' imprisonment, on condition that he be confined in a jail-type institution for four months, the remainder of the sentence being suspended and petitioner placed on probation. The court of appeals affirmed (Pet. App. A).

Petitioner's income tax return for 1961, the year as to which he was convicted, was prepared by an accountant on the basis of monthly summaries of income and expenses furnished to him by petitioner. The return showed a negative taxable income of $178.91, and thus that no tax was due. The government by direct evidence of specific items proved that he had received and failed to report as gross income a total of $6,355. After allowing all deductions claimed by petitioner, it was the government's contention that he had a corrected taxable income of $2,099.81 and a tax liability of $419.96. In the court of appeals both parties pointed out an error in the computed deduction for medical expenses, and agreed that the corrected taxable income for 1961 was $1,877.43 (and not $2,099.81) and the corrected tax liability $375.49 (and not $419.96).[1]

The trial court charged the jury as follows (Pet. 7):

> It is not necessary that the Government establish that the amount of income received and the amount of tax owing were exactly the amounts alleged in the various counts of the indictment. The precise amount of the tax is not the gist of the offense. It is sufficient if the Government proves beyond a reasonable doubt that there was a wilful and knowing attempt to evade a substantial part of the income tax due as alleged in each of the counts in the indictment.

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[1] This error—which, as the court of appeals pointed out (Pet. App. 1a), was *de minimis*—was overlooked by both parties during the trial.

> Now, the meaning of the word "substantial," as here used, depends upon the facts, circumstances, and conditions as shown by the evidence as to each particular count. Any amounts of unreported taxable income or tax greater than sums relatively small, under the particular circumstances pertaining thereto, are substantial.
>
> Any amounts of unreported taxable income or taxes should be disregarded which reasonably may be accounted for as due to error, oversight, or as reasonably considered inconsequential by a taxpayer.

Petitioner made no objection to the charge.

DISCUSSION

Section 7201 of the Internal Revenue Code proscribes any willful attempt "to evade or defeat any tax." The elements of a violation of that provision are willfulness, the existence of a tax deficiency, and an affirmative act constituting evasion or attempted evasion of the tax. *Sansone* v. *United States*, 380 U.S. 343, 351. Of course, there may come a point where the tax deficiency is so small that the jury might well have enough doubts about willfulness to acquit, just as there may come a point where it is so small that a conviction cannot properly stand, *i.e.*, that the deficiency is not sufficiently great as a matter of law to support a conviction. But surely that point was not reached, or even approached, in the instant case. Here petitioner did not simply seek to evade a part of his tax for the year in question; he attempted to evade all of it, as the return he filed

showed no tax liability at all. Thus, the established tax deficiency of $375.49, a substantial amount even in absolute terms, is even more significant in light of the fact that it represents 100 percent of the correct tax. Accordingly, the courts below correctly concluded that substantiality was shown as a matter of law.

There is no confusion on the question here involved in the lower courts nor any conflict among the circuits. Indeed, the two circuits—the Second and the Eighth—which have faced the same sort of issue presented here have taken the same approach as the court below. In *United States* v. *Gross*, 286 F. 2d 59, 61 (C.A. 2), certiorari denied, 366 U.S. 935, it was held that a $2,500 item of omitted *income*, if sufficiently substantial in relation to the total income, is large enough to support a conviction under Section 7201. In *Janko* v. *United States*, 281 F. 2d 156, 163 (C.A. 8), reversed on other grounds, 366 U.S. 716, the tax evaded was $134 in the first year and $264 in each of the following two years.[2] In the case at bar the tax deficiency was appreciably greater, both in terms of dollar amount and percentage of total tax liability. Moreover, we are unable to find any case in which a conviction was reversed on the ground that the proved

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[2] In *Janko* the defendant, having been sentenced to consecutive prison terms of four years, three years and three years, argued on appeal that the evasion was not substantial because the dollar amounts involved were too small. His conviction on the first count was reversed on another ground, but the Eighth Circuit sustained the conviction on the last two counts (281 F. 2d at 161, 163).

tax deficiency was too insubstantial to support a conviction.[3]

Petitioner's contention (Pet. 14-16) that the government had the burden of proving the relevant tax rate is without merit and obviously an afterthought. No requested instruction on the point was submitted at trial, nor did petitioner in any way raise the point until after the trial was over. The amount of the tax deficiency was a subject for expert testimony, and not for computation by the jury.

Finally, it would be impractical, in our view, for this Court to attempt to lay down the general guidelines requested by petitioner on the issue of substantiality of tax deficiencies. Whether such deficiencies are large enough to support convictions is a matter which depends upon the facts of each individual case;

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[3] In fact, some courts have indicated that the concept of a substantial tax deficiency has no application in a case, such as the present one, which is grounded on direct evidence of the omission of specific items of income from a tax return. *United States* v. *Nunan*, 236 F. 2d 576, 586 (C.A. 2), certiorari denied, 353 U.S. 912; *United States* v. *Cindrich*, 241 F. 2d 54, 57 (C.A. 3). However, there is no need to reach that issue, since the deficiency here was plainly substantial as a matter of law.

it is not susceptible to the kind of particularization that petitioner seeks.[4]

Respectfully submitted.

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[4] There is no merit in the argument (Pet. 12) that the trial court substituted a "substantial evidence" requirement for proof beyond a reasonable doubt. Like an appellate court passing upon the sufficiency of the proof to support a conviction, a trial court in passing upon a motion for acquittal need concern itself only with the question of whether there is substantial evidence of guilt. *Pierce* v. *United States*, 252 U.S. 239, 251; *Glasser* v. *United States*, 315 U.S. 60, 80. The "reasonable doubt" requirement is applicable to the jury, and it is for the jury to decide whether the proof excludes all reasonable doubt.

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